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7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE DISTRICT OF ARIZONA  
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12 Susan Stone, ) No. CIV 02-1413 PHX RCB  
13 Plaintiff, )  
14 vs. ) O R D E R  
15 GAB Robins North America, )  
16 Inc., )  
17 Defendant. )

18 On June 27, 2002, Plaintiff Susan Stone ("Stone") filed a  
19 Complaint against her former employer GAB Robins North America,  
20 Inc. ("GAB") in the Superior Court of Arizona in Maricopa County.  
21 Notice of Removal (doc. 1). The matter was removed to this Court  
22 on the basis of diversity on July 26, 2002. Id. The Complaint  
23 alleged five causes of action: (1) breach of contract; (2) breach  
24 of the covenant of good faith and fair dealing; (3) violation of  
25 the Arizona Wage Act, ARIZ. REV. STAT. § 23-350, *et. seq*; (4) fraud;  
26 and (5) negligent misrepresentation. Id. at Exbt. A. All five  
27 causes of action relate to two specific allegations made by Stone.  
28 First, Stone claims that GAB improperly calculated her 2001 bonus.

1 Second, Stone claims that GAB improperly withheld 30% of her bonus.

2 On March 18, 2005, the Court granted partial summary judgment  
3 in favor of GAB on one of Stone's claims. Order (doc. 48) at 13.  
4 The trial on the remaining claims against GAB is scheduled to begin  
5 on March 7, 2006. Order (doc. 66).

6 Both parties have filed motions in limine seeking the  
7 exclusion of certain testimony and a limitation on the manner in  
8 which a particular document may be referred. P. Mot. (doc. 57); D.  
9 Mot. Language (doc. 55); D. Mot. Discretionary Bonus (doc. 56).  
10 The Court has considered the arguments presented and is now  
11 prepared to rule.

12 **I. Stone's Motion in Limine**

13 In her motion, Stone requests that the Court (1) preclude GAB  
14 from testifying, asserting, or arguing that any bonus plans or  
15 agreements that were not presented to Stone in the course of her  
16 employment constitute binding contracts or agreements; and (2) that  
17 if such plans or agreements are offered by GAB, that the jury be  
18 instructed that plans or agreements that were not provided to Stone  
19 cannot constitute binding contracts or agreements, and cannot  
20 modify an existing plan or agreement that has been provided. P.  
21 Mot. (doc. 57) at 1.

22 GAB is an independent insurance adjusting company providing  
23 claims adjusting and claims management services to insurance  
24 companies and self-insured entities. DSOF (doc. 34) at ¶ 9. The  
25 majority of GAB's business arises out of two divisions within the  
26 organization: Risk Management Services ("RMS") and Insurance  
27 Company Services ("ICS"). Id. at ¶ 10. Stone was employed with  
28 GAB from 1994 to 2002, as a Regional Account Executive. PSOF (doc.

1 39) at ¶¶ 1-2.

2 Prior to March 12, 2001, GAB had an ICS bonus plan and a  
3 separate RMS bonus plan. DSOF (doc. 34) at ¶ 21-24. However, on  
4 March 12, 2001, GAB issued a new plan that was explained in writing  
5 to each ICS salesperson by way of a form letter ("Plan Letter").  
6 Exbt 8 (doc. 34). The Plan Letter did not specifically indicate  
7 that the new plan would apply to only ICS sales, and not RMS sales.  
8 Id. Thereafter, Stone landed a large RMS sale and expected to  
9 receive a bonus pursuant to the new incentive plan. However, GAB  
10 refused to pay her a bonus under the new plan, asserting that  
11 another plan existed for RMS sales.

12 Stone asserts that the Plan Letter was the only written  
13 incentive compensation plan for 2001 ever provided to her. P. Mot.  
14 (doc. 57) at 2. Thus, her motion in limine seeks to preclude GAB  
15 from arguing at trial that the alleged separate RMS plan  
16 constituted a contract or agreement with Stone. In support of her  
17 motion, Stone cites case law discussing what is required to effect  
18 a unilateral modification to an employment contract. Id. at 2-4  
19 (citing DeMasse v. ITT Corp., 194 Ariz. 500 (1999)).

20 In response, GAB argues that Stone's motion should be denied  
21 because GAB disputes that its compensation plans constitute  
22 "contracts." Resp. to P. Mot. (doc. 60) at 2. GAB asserts that  
23 the Plan Letter was "merely a statement of [its] bonus policy[.]"  
24 Id. at 3. In addition, GAB notes that Stone, in her application  
25 for employment, expressly agreed that GAB could modify its policies  
26 and procedures at any time without notice, thus allowing GAB the  
27 right to determine its pay policies. Id. at 3.

28 In its order of March 18, 2005, the Court determined that the

1 issue of whether the Plan Letter distributed by GAB became a part  
2 of Stone's at-will employment contract is a factual question that  
3 must be decided by a jury. The Court did not decide whether or not  
4 the Plan Letter was a contract. Thus, the preclusion of testimony  
5 related to the status of the alleged RMS bonus plan and how it  
6 affected Stone's employment or bonus contract with GAB assumes that  
7 such a contract existed in the first place. Such a conclusion by  
8 the Court would be inappropriate. Accordingly, the Court shall  
9 deny Stone's motion.

## 10 **II. GAB's Motion in Limine Regarding Language Use**

11 In relation to the issues discussed above, GAB seeks to  
12 preclude Stone, her counsel and witnesses, from referring to the  
13 Plan Letter as a "contract," "understanding," "agreement" or any  
14 similar term at trial. D. Mot. Language (doc. 55) at 1. GAB notes  
15 that the Court, in its order of March 18, 2005, concluded that the  
16 issue of whether the Plan Letter was a contract or became a part of  
17 Stone's at-will employment contract is a factual question that must  
18 be decided by a jury. Id. at 2. Consequently, GAB argues that  
19 allowing such references at trial, other than during opening and  
20 closing statements, would unduly prejudice GAB and could mislead  
21 the jury, unfairly swaying them in deciding an ultimate fact issue.  
22 Id. at 2-3. Thus, under Federal Rule of Evidence 403, GAB contends  
23 that such references should be precluded. Id. at 3.

24 In contrast, Stone argues that such references are not  
25 prejudicial and are, in fact, critical to the crux of this case.  
26 Resp. to D. Mot. Language (doc. 59) at 2. Stone asserts that both  
27 parties' understandings of the intent of the Plan Letter, as well  
28 as the interpretation of the plan, are critical to the claims in

1 this case. Id. at 4. Accordingly, Stone argues that any and all  
2 witnesses and attorneys should be able to provide evidence and  
3 argument as to what their understandings were of the plan, and that  
4 counsel should be entitled to argue that the Plan Letter was a  
5 contract or agreement. Id. "Defendant's counsel will be able to  
6 cross-examine Plaintiff or any other witness as to their  
7 understanding or belief." Id.

8 In the case at bar, a jury will be asked to decide whether a  
9 contract or agreement existed between the parties. Thus, the need  
10 to explore the parties' understandings of the Plan Letter makes  
11 improper the complete preclusion of the use of such language.  
12 However, because of legitimate Rule 403 problems of prejudice, the  
13 Court shall allow counsel for both Stone and GAB to argue that the  
14 Plan Letter was a "contract," "understanding," "agreement" or any  
15 similar term, in opening statements and, depending on the evidence,  
16 closing arguments, but will preclude counsel, in their questioning,  
17 from characterizing the document as a "contract," "understanding,"  
18 "agreement" or any similar term. This does not preclude any witness  
19 from characterizing the document as such if he or she does so in a  
20 legitimate response to an appropriate question. Furthermore, should  
21 the state of the evidence justify the reconsideration of this  
22 matter at trial, the Court will not preclude either party from  
23 raising the issue again. Therefore, the Court shall grant in part  
24 and deny in part GAB's motion.

### 25 **III. GAB's Motion in Limine Regarding Discretionary Bonus**

26 GAB also seeks to preclude Stone, her counsel and witnesses,  
27 from referring to, testifying about, or questioning witnesses  
28 regarding her previously dismissed claim relating to her unpaid 30%

1 discretionary bonus and its underlying facts. D. Mot.  
2 Discretionary Bonus (doc. 56) at 4. In this case, Stone alleged  
3 two claims based on the Arizona Wage Act, A.R.S. § 23-350, one of  
4 which sought treble damages for a 30% discretionary bonus she did  
5 not receive for 2001. In its order dated March 18, 2005, the Court  
6 dismissed this claim, finding that "the 30% of the bonus monies at  
7 issue were discretionary, and consequently, not covered by the  
8 Arizona Wage Act." Order (doc. 48) at 13. Accordingly, GAB argues  
9 that all evidence and allegations relating to this claim should be  
10 precluded because it would be irrelevant, unduly prejudicial to  
11 GAB, mislead the jury and cause an undue waste of the Court's time.  
12 D. Mot. Discretionary Bonus (doc. 56) at 2. Specifically, GAB  
13 argues that the probative value of such testimony is substantially  
14 outweighed by its prejudicial effect, as it could cause the jury to  
15 base its decision on sympathy for Stone. Id. at 3.

16 In opposition to GAB's motion, Stone argues that the  
17 preclusion of such testimony would inhibit her from seeking relief  
18 for the unpaid bonus monies under other legal theories set forth in  
19 her Complaint. Resp. to D. Mot. Discretionary Bonus (doc. 58) at  
20 2. Stone notes that the Court, in its order of March 18, 2005,  
21 granted summary judgment in favor of GAB on the narrow issue of  
22 whether she could claim treble damages under the Arizona Wage Act.  
23 Id. Despite the dismissal of this one claim, Stone asserts that  
24 she still seeks relief in regard to the unpaid discretionary bonus  
25 under her claims of breach of contract, breach of the covenant of  
26 good faith and fair dealing, fraud and misrepresentation. Id.

27 In light of Stone's active claims for the discretionary bonus  
28 under the above listed legal theories, the Court concludes that the

1 preclusion of testimony related to the contested bonus monies would  
2 be inappropriate. Consequently, the Court shall deny GAB's motion.

3 Therefore,

4 IT IS ORDERED that Stone's Motion in Limine (doc. 57) is  
5 DENIED.

6 IT IS FURTHER ORDERED the GAB's Motion in Limine Regarding Use  
7 of Contract, Understanding, Agreement or the Like (doc. 55) is  
8 GRANTED in part and DENIED in part in accordance with this order.

9 IT IS FURTHER ORDERED the GAB's Motion in Limine Regarding  
10 Plaintiff's Dismissed Claims (doc. 56) is DENIED.

11 DATED this 6th day of February, 2006.

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15 Robert C. Broomfield  
16 Senior United States District Judge

17 Copies to counsel of record  
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